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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS
OFFICE

In the matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR)
Systems in the 800 MHz)
Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j))
of the Communications Act-)
Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

REPLY COMMENTS OF PITTENCRIEFF COMMUNICATIONS, INC.

PITTENCRIEFF COMMUNICATIONS, INC.

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Dated: March 1, 1995

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SUMMARY

Pittencrieff Communications, Inc. ("PCI") believes that the lower 80 SMR channels, as well as the 150 channels currently designated for General Category use, should be available for use by local SMR systems. The upper 200 SMR channels should be designated for use by wide area SMR systems on a BEA basis. Site-specific licensing should be retained for local systems. If the Commission adopts mandatory retuning, it should ensure incumbent licensees that they will be able to continue to serve their customers. Incumbent licensees that continue to operate on their current facilities should be afforded generous co-channel protection from wide area licensees. PCI supports the designation of the General category channels for local SMR use and the continued availability of pool channels for intercategory sharing. Finally, PCI strongly objects to the use of auctions to license local SMR channels.

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Pittencrieff Communications, Inc. ("PCI" or the "Company"), by its attorneys and pursuant to the provisions of Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Reply Comments in response to the initial Comments of other parties which addressed the Further Notice of Proposed Rule Making ("Further Notice") adopted in the above referenced proceeding¹ designed to implement a new framework for licensing of specialized mobile radio ("SMR") systems in the 800 MHz band.

¹ Further Notice of Proposed Rule Making, P.R. Docket No. 93-144, FCC 94-27 (released November 4, 1994). The FCC twice extended the dates for the submission of Comments and Reply Comments in this proceeding. See, Order, P.R. Docket No. 93-144, DA 94-1326 (released November 28, 1994) and Order, P.R. Docket No. 93-144, DA 95-67 (released January 18, 1995).

I. INTRODUCTION

PCI submitted Comments in this proceeding on January 5, 1995. It argued that the lower 800 MHz SMR channels, as well as the 150 channels now designated for General Category use should be available for SMR systems and that the rules governing these systems should remain essentially as they are today. PCI supported the Commission's proposal to allocate 10 MHz of spectrum for Major Trading Area ("MTA") based licensing in 2.5 MHz blocks, but suggested that no more than 7.5 MHz of spectrum be initially controlled by one entity. PCI also supported the continuation of site specific licensing for all local SMR systems.

PCI stated, and it continues to believe, that the establishment of wide area SMR based licensee rights must not come at the expense of incumbent licensees. PCI opposed mandatory retuning and urged the Commission to impose meaningful co-channel separation requirements between incumbent and wide area SMR licensees. PCI also stated that all SMR licensees should not be considered CMRS providers.

Many other parties submitted comments in response to the Further Notice. PCI has actively engaged in discussions with some of those entities in an effort to present the Commission with a consensus position that satisfies the regulatory requirements of wide area SMR licensees, and enables local SMR licensees to continue to serve their customers. PCI has been involved with the efforts of the American Mobile Telecommunications Association ("AMTA") to formulate a consensus position. Nevertheless, PCI believes that additional discussion within the SMR industry is still required. The position that PCI expects to be promoted in the AMTA Reply Comments represents the best available compromise today between the interests of wide area SMR licensees and those of smaller operators. However, that

position is not ideal and requires further refinement. Accordingly, PCI expects to communicate with the Commission on a permissible ex parte basis in an effort to: 1) further clarify the issues necessarily left unresolved at this stage of the proceeding; and 2) arrive at a position that can be endorsed by an even broader segment of the SMR industry. PCI is pleased, however, to submit the following Reply Comments to address the initial comments of other parties and to reexamine its own positions in light of the discussions conducted with industry representatives.²

II. REPLY COMMENTS

A. Channel Assignment and Service Area

1. Spectrum Designated for Wide Area Licensing

PCI recommended that the lower 80 SMR channels, as well as the 150 channels currently designated for General Category use, be available for SMR systems on a local basis. The majority of other parties agreed with PCI's recommendations.³ If the FCC requires retuning of licensees now employing the "upper" 200 SMR channels, both the 80 lower SMR channels as well as the General Category channels will be required for such retuning. Moreover, the Commission should ensure that adequate spectrum exists for licensees to expand their facilities. Accordingly, PCI agrees with Motorola's suggestion that Business Radio Service channels remain available for local SMR licensees who are using the lower 80 SMR and General Category channels, to expand their systems.⁴

² PCI does not address each issue raised in the Further Notice or its initial Comments. Instead, PCI attempts to discuss only the broad questions involved in this proposed fundamental change to the structure of the SMR industry. PCI looks forward to working with the Commission and other representatives of the SMR industry to formulate a more complete regulatory structure once the broader questions posed by this proceeding are resolved.

³ See, e.g., Comments of OneComm Corp.; Comments of Advance MobileComm, Inc.; Comments of Motorola, Inc.

⁴ See Comments of Motorola at p. 17.

2. Size of Wide Area Blocks and Spectrum Aggregation Limit

In its initial Comments, PCI agreed that the Commission should license four 50 channel blocks on an MTA basis. PCI proposed that no more than 7.5 MHz of spectrum, of the 10 MHz available for wide area system licensing, be initially controlled by one party. It is PCI's understanding that AMTA will propose, in its Reply Comments, licensing of wide area systems on a basis specified by the U.S. Bureau of Economic Analysis (so called "BEAs").⁵ Instead of four 50 channel blocks, AMTA will recommend licensing two blocks-one of 120 channels and one of 80 channels.

PCI still believes that it is in the public interest for the Commission to license as many entities as possible to offer wide area SMR service. In the interest of compromise, PCI is willing to consider the issuance of only two wide area SMR licenses in an area, if the area is the size of a BEA. PCI was concerned that by licensing blocks of spectrum greater than 50 channels on an MTA basis, local licensees would not have a meaningful opportunity to secure an authorization covering their market area, because all the available spectrum would be subsumed by the MTA based licensee, who might have otherwise not been interested in serving the existing licensee's market.⁶ However, by licensing on a BEA basis only, existing local SMR providers will have an opportunity to secure a wide area authorization where they already offer service.⁷ Accordingly,

⁵ See 59 Fed. Reg. 55416 (November 7, 1994).

⁶ PCI recognizes that under an MTA licensing scheme, local service providers could team with MTA applicants, to ensure that they have an ability to continue to serve their market as part of a coalition under the sponsorship of the MTA applicant. PCI vigorously disagrees with this approach. While coalition licensing should be permitted, the Commission should structure the regulations to foster a "building block" plan, under which licensees could secure the ability to serve discrete market areas, and aggregate licenses as necessary to serve wider areas. It is illogical and contrary to natural market dynamics to require service providers to seek licenses for more coverage area than they desire, thereby forcing a pre or post application geographic division of coverage area.

⁷ The opportunity for existing local SMR providers to secure a wide area authorization will be enhanced by a strict construction requirement, because these licensees will be in the best position to fulfill such a

PCI expects that local SMR service will be preserved by the authorization of wide area licenses on a BEA basis, even if only two licenses are available.

3. Licensing of Non-Contiguous Local Channels

PCI recommended, in its initial Comments, that the Commission continue to license all local channels-both the current lower 80 SMR channels, as well as the 150 General Category channels-on a site specific basis. It is PCI's understanding that AMTA will recommend that, following retuning of incumbent licensees, remaining SMR channels would be licensed on a BEA basis, with mutually exclusive applications resolved through an auction.

PCI believes that while ultimately some local SMR channels could be licensed on a BEA basis, today that alternative is neither feasible nor desirable. These local channels will be employed by wide area licensees to relocate incumbent SMR systems. Because many BEAs are large enough to accommodate co-channel systems, even with 70 mile coverage protection, it is likely that there will be more than one local licensee in those BEAs. Sound engineering principles, along with a reliable FCC database, can ensure that local channels are licensed where they are needed, when they are needed, while offering protection to co-channel users.⁸ These local SMR systems would continue to be governed by regulations in place today.⁹

strict requirement for their respective service areas. Conversely, MTA licensing might favor incumbent licensees authorized for many channels in one portion of an MTA, but with no relationship to other areas of the MTA.

⁸ Because PCI recommends that local channels be available in groups of five only (as specified in the regulations today), local licensees would only be able to secure additional channels if they constructed the channels covered by their original authorization. This requirement, along with site specific licensing, should preserve spectrum for future growth of local SMR systems.

⁹ As noted below, the Company disagrees with the Commission's presumption that these local systems would be categorized as CMRS providers. Accordingly, the Commission would not be required to conduct auctions to license these facilities.

Retention of site specific licensing, which was endorsed by other commenting parties¹⁰ would not necessarily foreclose licensing of these systems on a BEA basis in the future. In order to secure a BEA license, PCI recommends that a local licensee demonstrate either that: 1) no other co-channel systems serve the BEA; or 2) it has secured the consent of all affected co-channel licensees. In either case, the local BEA licensee would still be required to serve a Commission specified percentage of the BEA, or face loss of the BEA authorization.¹¹ Because the new BEA authorization would simply be a modification of an existing license, and because, as PCI has postulated the application criteria, there could be no competing applications, the Commission would never be required to employ its auction authority. However, because of the importance of using local SMR channels in the retuning process, no such BEA applications for local service should be accepted until the Commission determines that the retuning process is complete.

4. Licensing in Mexican and Canadian Border Areas

A fundamental reason for dramatically changing the rules to permit wide area licensing, as opposed to simply conforming the regulations to the waiver process by which many wide area authorizations were granted, is to permit licensees to array channels in a contiguous fashion.¹² However, because of the anomalies associated with the spectrum allocation on the Mexican and Canadian borders, contiguous spectrum may not always be available, even with relicensing of

¹⁰ See, e.g., Comments of Ericsson Corporation; Comments of Genesee Business Radio Systems, Inc.; Comments of Russ Miller Rental.

¹¹ In the very unlikely event that there exists a BEA today in which each of the lower 80 SMR channels and the 150 General Category channels are not employed somewhere, it is possible that an application could be submitted for a new local BEA authorization. In that case, the Commission might be required to choose between mutually exclusive applications for new systems. However, the Commission should not regulate the majority of local systems as CMRS providers on the remote chance that any such licensing opportunities exist.

¹² See Comments of Nextel Communications, Inc. ("Nextel") at pp. 21-26.

incumbent systems. Accordingly, PCI questions whether it necessary to adopt the same regulatory scheme, including the use of auctions, in border locations as the Commission would impose elsewhere. A modification of the regulations to permit geographic based licensing would be sufficient in border areas to achieve the Commission's goals.

In addition, there are fewer channels available in the border areas than there are in the remainder of the country. Nevertheless, in the interest of consistency, PCI recommends that the Commission adopt an approach in border areas similar to that which it will employ in other locations. Accordingly, in border areas, one third of the available 800 MHz spectrum should be designated for wide area BEA systems. Of that percentage, two licenses, one of 40% of the channels, and the other of 60% of the channels, would be issued. The remainder of the channels would be available, on a percentage basis, in the same fashion as are the 800 MHz channels in other areas.

B. Rights and Obligations of Wide Area Licensees

In its initial Comments, PCI strongly opposed mandatory retuning of existing licensees employing the "upper" 200 SMR channels for the benefit of wide area licensees. PCI expects that AMTA's Reply Comments will propose a process of "progressive" retuning. Under this arrangement, wide area licensees that demonstrate they have successfully assembled a significant percentage of the existing constructed channels in a BEA would be entitled to mandatory retuning of remaining notified incumbents. The required percentage of assembled channels would be reduced over time. After four years following license grant, under the AMTA plan, the wide area licensee would be entitled to mandatory retuning of any remaining notified incumbents.

PCI continues to be troubled by any form of mandatory retuning. However, in the interest of reaching an industry consensus that promotes wide area SMR systems, as mandated by Congressionally imposed regulatory parity requirements¹³ as well as protects local SMR licensees, PCI is willing to accept the imposition of mandatory retuning under certain terms and conditions. First, it is critical that to achieve mandatory retuning on an expeditious basis, the wide area licensee must demonstrate that it has attempted to obtain the use of as great a percentage as possible of the channels in its BEA. Under these conditions, wide area licensees will be incentivized to engage in a voluntary retuning program that is fair to existing licensees.

Second, the retuning process must be structured so as to ensure that incumbent licensees are able to continue to serve their customers with no additional costs and with virtually no interruption in service. PCI envisions that in order to achieve this goal, the Commission should adopt retuning policies similar to those imposed on incumbent microwave licensees forced to relocate by the initiation of personal communications service ("PCS").¹⁴ Prior to any mandatory retuning, wide area licensees would be required to offer a "premium package" of benefits to incumbent licensees.¹⁵ That premium package would include:

- Tax certificates, to the extent available.
- A minimum of 70 mile co-channel protection on retuned channels.
- The use of channels that can be employed at the licensee's existing site or anywhere within the licensee's existing coverage area, at the licensee's option.
- Full cost compensation for all reasonable retuning expenses.

¹³ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 Title VI § 6002 (b), 107 Stat. 312, 392 (1993).

¹⁴ See Redevelopment of Spectrum to encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, Second Memorandum Opinion and Order, 9 FCC Rcd 7797 (1994).

¹⁵ As noted below, this premium package would be required to be made available, upon request, by any incumbent licensee. However, with the mutual consent of the wide area and incumbent licensees, other forms of compensation would be available. PCI's proposal is designed to ensure a minimum level of benefits to permit the incumbent licensee to continue to serve its customers.

Under PCI's formulation, wide area licensees would be required, within 90 days of receiving an authorization, to notify every affected incumbent licensee. Within one year of the notification, in order to achieve certainty, incumbent licensees can demand that wide area licensees retune their facilities on at least the premium package basis. Failure of the wide area licensee to do so would result in the incumbent licensee retaining its authorization under existing terms and conditions. Thereafter, the wide area licensee would have no ability to require retuning.

After the wide area licensee aggregated sufficient spectrum to avail itself of the mandatory retuning option, incumbent licensees would still be subject to retuning only on a basis that permits them to continue to offer service to customers. In particular, PCI recommends that mandatorily retuned incumbent licensees be entitled to the following "standard retuning package":

- Co-channel protection at a level then specified in the Commission's rules.
- The use of channels that can be employed at the licensee's existing site.
- Full cost compensation for all reasonable retuning expenses.

If wide area licensees are unable to offer this "standard retuning package" the incumbent licensee would also retain its authorization under existing terms and conditions. Thereafter, the wide area licensee would have no ability to require retuning.

This plan will assist incumbent licensees as well as wide area providers. By signaling that a "premium package" will be available for a limited period of time, followed by a less attractive alternative, the Commission will encourage incumbent licensees to seek voluntary retuning. However, incumbent licensees will be protected if they choose voluntary retuning and

the wide area licensee is unable to provide them with comparable spectrum.¹⁶ Moreover, even those incumbent licensees who do not choose voluntary retuning will be afforded an opportunity to secure substitute spectrum, usable under the same terms and conditions as their existing channels, for no cost.¹⁷ While PCI remains unenthusiastic about any required retuning, its plan should protect incumbent licensees and provide appropriate opportunities and incentives for wide area licensee.

Any incumbent licensees that continue to operate on their existing channels (either because the wide area licensee does not desire, or is unable to engage in voluntary or mandatory retuning under the conditions proposed by PCI) should be afforded generous co-channel protection from the wide area licensee. Unless the wide area licensee has constructed facilities on the common channels at the time of the license grant, such “grandfathered” incumbent licensees should be fully protected by the wide area licensee for at least the 40/22 dBu separation criteria. Similarly, if the “grandfathered” incumbent licensee subsequently wishes to modify its system, it should be permitted to do so, observing the 40/22 dBu co-channel separation criteria with any constructed system.¹⁸

¹⁶ If there is a dispute between the incumbent and wide area licensees concerning whether the wide area licensee is meeting the requirements under either the standard or premium retuning package, alternative dispute resolution would be required.

¹⁷ PCI recognizes that other parties have requested that the Commission identify a “relocation block” for retuned incumbent systems. See Comments of SMR WON at pp. 49-51. While PCI supports the concept of a relocation block in principle, it doubts whether identification of such a block is feasible. PCI’s proposal is designed to ensure that the incumbent licensee is provided with a continuing ability to serve its customers. While ideally, the incumbent licensee would be able to identify additional spectrum for system expansion, such additional spectrum is generally not available today. Moreover, under PCI’s local licensing approach, it is more likely that spectrum will remain available for system expansion.

¹⁸ If there are more than one such “grandfathered” incumbent systems on common channels, their relationship would be defined by the then existing co-channel separation criteria for local systems.

C. Construction Requirements

PCI's Comments supported strict construction requirements for both local and wide area systems. PCI continues to believe such strict construction requirements are necessary. Moreover, wide area licensees who aggregate all 200 "upper" SMR channels should not be permitted to satisfy these construction requirements on an aggregated basis. That is, those licensees cannot meet the construction requirements by building only, for example, the 120 channel block, while leaving the remaining 80 channels unutilized. Each block, because it will be separately licensed, must be separately constructed in accordance with the Commission's rules or risk channel recapture.

PCI's initial Comments recommended modification of the proposed coverage requirements so that wide area licensees could satisfy those requirements by serving either 75% of the population or 75% of the coverage area. The Company's concerns were based primarily upon the Commission's proposed use of MTA based licensing. If, as PCI recommends, BEA licensing is employed, provision of service to a percentage of the population only is an acceptable test of a licensee's provision of service in a timely fashion.

D. SMRs on General Category Channels and Inter-Category Sharing

PCI argued in its initial Comments that the Commission should designate the General Category channels for local SMR use and that Pool channels should continue to be available for intercategory sharing. Other parties agreed with PCI's contentions.¹⁹ Moreover, the Company reiterates its strong objection to the use of auctions to license local SMR channels. It is the presumption that local SMR channels would be auctioned that causes the Commission to inquire

¹⁹ See, e.g., *supra*, fn. 3.

whether these channels should all be potentially available for SMR use. Because, as demonstrated in the Company's Comments, local SMR channels should not be auctioned, there should be no reason to restrict local SMR use of General Category or Pool channels.

E. Licensing Mechanisms

PCI's initial Comments generally agreed with the Commission's proposal for licensing wide area SMR systems. That proposal envisioned the use of auctions in a fashion similar to the mechanisms employed for auctioning PCS licenses. PCI recognizes that other parties have recommended licensing mechanisms that do not involve auction for wide area licenses.²⁰ As PCI noted in its initial Comments, the SMR industry is mature and features local SMR providers, and wide area providers like the Company. PCI would prefer if the Commission simply modifies its regulations to permit wide area licensing, without requiring the use of auctions. Such a licensing procedure, like the previously used waiver mechanism, could rely upon an existing licensee's use of a channel in a particular geographic area. Nevertheless, if the Commission concludes that the use of contiguous spectrum is important for wide area licensing, many of the issues discussed above must still be addressed. Accordingly, while the Company prefers that no auctions be employed to license wide area SMR systems, it believes its Reply Comments above are relevant to any form of licensing designed to achieve the use of contiguous spectrum.

The Company continues to strongly oppose the use of auctions for licensing local SMR systems. These facilities will not be substantially similar to wide area SMR systems or any other form of broadband mobile communications service. Moreover, if the Commission, pursuant to the Company's recommendation, licenses local systems on a site specific basis now, and a BEA

²⁰

See, e.g., Comments of PCIA at pp. 17-19.

basis later, it is unlikely that there will be competing applications warranting an auction. The Commission should recognize these circumstances and determine that the use of auctions for local SMR licensing would be counterproductive and a waste of public resources.²¹

F. Competitive Bidding Issues

The Company's Comments did not object to the proposed special provisions for small businesses, women and minorities with regard to wide area based licensing. It is PCI's understanding that AMTA will recommend that auction rules for wide area systems include preferences for incumbent licensees within the geographic area seeking to expand existing systems. AMTA is expected to further recommend that no preferences are necessary for designated entities.

Upon review of the comments of other parties, PCI agrees. Auction rules should recognize the important role of existing SMR licensees in the licensing process for wide area systems. Similarly, it is unclear why preferences for small businesses, women and minorities would be appropriate in this context.

III. CONCLUSIONS

All General Category and the "lower 80" SMR channels should be designated for local SMR use, and Pool channels should continue to be available for intercategory sharing. Local SMR systems should be licensed on a site-by-site basis, while wide area systems should be licensed on a BEA basis. Should the Commission adopt mandatory retuning of incumbent


²¹ As noted in the Company's initial Comments, the use of auctions to license local SMR systems is a perversion of Congressional intent. Congress wished to provide small businesses, women, minorities and other designated entities with an opportunity to participate in the wireless communications marketplace when it adopted laws authorizing the use of auctions. However, local SMR systems are already operated by small businesses. Requiring current licensees to bid for spectrum will make it less likely that they will be able to continue to meaningfully participate in the local SMR marketplace.

licensees, it should provide sufficient opportunities for the incumbent licensees to continue providing comparable service. Finally, the Commission should not employ auctions in the licensing of local SMR channels.

WHEREFORE, THE PREMISES CONSIDERED, Pittencrieff Communications, Inc. hereby submits its Reply Comments in the foregoing proceeding and urges the FCC to act in a manner consistent with the views expressed herein.

Respectfully submitted

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